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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

CARLOTTA NAVARETTE et al., Plaintiffs and Appellants, v. TIMOTHY TUTTLE et al., Defendants and Respondents.	B164474, B170217 (Los Angeles County Super. Ct. No. SC069538)
CARLOTTA NAVARETTE et al., Plaintiffs and Appellants, v. RANDY GREENWOOD, as Administrator, etc., Defendant and Respondent.	(Los Angeles County Super. Ct. No. BC263532)

APPEAL from judgments of the Superior Court of Los Angeles County. Lorna Parnell, Judge. Affirmed.

Randolph & Associates, Donald C. Randolph and Frances M. Campbell for Plaintiffs and Appellants.

Morris Polich & Purdy, David L. Brandon, Richard H. Nakamura, Jr., Gary L. Hoffman and Karyl L. Towell for Defendants and Respondents.

In this wrongful death action, plaintiffs and appellants[1] allege that the decedent's coworkers and employer are liable for battery and violations of Business and Professions Code section 17200 in connection with the decedent's death. The trial court sustained the demurrer of defendants and respondents Timothy Tuttle (Tuttle), Tuttle Family Enterprises, Inc. doing business as Peerless Building Maintenance (Peerless), and the Estate of Rodney Greenwood (Greenwood) on the grounds that these two causes of action were barred by the exclusive provisions of the Workers' Compensation Act (the Act) and were time-barred.

On appeal, appellants contend that the two causes of action fall outside the scope of the Act and are not time-barred. Appellants also urge that the trial court abused its discretion in (1) permitting live testimony at the hearing on respondents' demurrer, and (2) denying them leave to amend their pleading to assert allegations that fall outside the scope of the Act.

We affirm.

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[1] Appellants include Carlotta Navarette, the widow of Javier Navarette (the decedent), as well as the decedent's children: Gabriela, Ana, Marisela, and Alma Navarette.

FACTUAL AND PROCEDURAL BACKGROUND

"Because this matter comes to us on demurrer, we take the facts from plaintiff's complaint, the allegations of which are deemed true for the limited purpose of determining whether the plaintiff has stated a viable cause of action. [Citation.]" (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 885.)

The Incident

On November 29, 2000, the decedent fell off a scaffold and died. At the time of his death, the decedent was working as an employee of Peerless, cleaning windows at the J. Paul Getty Museum (the museum). According to appellants' original complaint, the decedent was using a scaffold that was not properly stabilized, causing him to fall to his death.

The Original Complaint

Exactly one year after the tragic incident, appellants filed their original complaint against the Getty Center[2] and Does 1 through 50. Appellants alleged that on November 29, 2000, the decedent was employed by Peerless and that Getty had hired Peerless to perform maintenance work at the museum, including the cleaning of windows and/or a glass wall. They further alleged that Getty had provided the decedent with a scaffold that included stabilizing legs, but that the stabilizing legs could not be properly used in the confined space in which the decedent was working. As a result, the decedent fell off the scaffold and died.

The complaint contained only two causes of action: (1) wrongful death, on the theory that Getty and the Doe defendants owed a duty of care to keep the property safe; and (2) negligence, on the theory that Getty and the Doe defendants breached their duty to maintain the property in a safe condition. The complaint did not allege that anyone intended to cause the decedent harm.

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[2] The original complaint as well as the first and second amended complaints refer to the "Getty Center" and the "J. Paul Getty Trust." As they are not parties to this appeal, for the ease of the reader, we refer to them as "Getty."

The First Amended Complaint

On February 25, 2002, Getty demurred; in response, on March 22, 2002, appellants filed a first amended complaint (FAC). The FAC again only named Getty and Does 1 through 50 as defendants.

Like the original complaint, the FAC identified Peerless as the decedent's employer; the decedent was part of the Peerless team. Appellants charged that Getty and the Doe defendants provided equipment, namely a portable personnel lift (PPL) to the Peerless team. The PPL used stabilizing legs and that the windows that the decedent was cleaning were in a confined area accessible by the PPL only if the stabilizing legs were detached. At the time of the incident, the legs were detached and, as a result, the decedent fell to his death.

The FAC contained only one cause of action -- wrongful death based on the negligent provision of unsafe equipment. Again, there was no allegation that anyone intended to cause the decedent bodily harm.

Criminal Charges

In early April 2002, a felony complaint for arrest warrant was issued. Count 1 alleged involuntary manslaughter against Mario Sanchez (Sanchez) and Peerless. Count 2 alleged violation causing death (violation of Lab. Code, § 6425) against Sanchez, Tuttle, and Peerless.

The Second Amended Complaint

On April 26, 2002, Getty demurred to the FAC. On July 23, 2002, appellants and Getty stipulated to the filing of appellants' second amended complaint (SAC), which was filed that same day.

In the SAC, appellants for the first time named Sanchez,[3] Peerless, Tuttle, and Greenwood as Doe defendants. Appellants alleged that Peerless had hired Greenwood as project manager for the job, that Sanchez was the "Peerless Team" foreman, and that the

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[3] Sanchez is not a party to this appeal.

decedent was part of the Peerless team. The SAC also averred that Greenwood was aware of the problem with the PPL, but still told Sanchez that they had to use it. Further, the SAC charged that Tuttle knew of the problem, but approved of using the purportedly unsafe PPL so as not to jeopardize Peerless's contract with Getty. Appellants then claimed that Sanchez instructed members of the Peerless team to use the PPL without the stabilizing legs.

As to these newly-added Doe defendants, appellants alleged causes of action for battery and violation of California's unfair competition laws (Bus. & Prof. Code, § 17200 et seq.). The wrongful death claim remained only against Getty.

Importantly, like the prior pleadings, the SAC did not allege that any defendant intended to cause the decedent any harm. Instead, the pleading averred that respondents engaged in a conspiracy to avoid safety regulations.

Peerless and Tuttle's Successful Demurrer

On October 1, 2002, Peerless and Tuttle filed a demurrer to the SAC. They argued that appellants' claims were preempted by the exclusivity provisions of the Act. They also argued that the new causes of action were time-barred.

Over appellants' opposition, the trial court sustained Peerless and Tuttle's demurrer without leave to amend. The trial court stated: "It seems to me this is barred by the exclusivity provisions. Likewise, I have significant problems as to whether [appellants] stated a cause of action with respect to the statute of limitations which, of course, is not enough." Judgment was entered, and this timely appeal followed.

Greenwood's Successful Demurrer

Several months later, on June 26, 2003, Greenwood filed his own demurrer to the SAC, asserting the same arguments Peerless and Tuttle advanced. On August 14, 2003, the trial court sustained Greenwood's demurrer without leave to amend "on the grounds the court lacks subject matter jurisdiction with respect to the causes of action and that the causes of action are barred by the statute of limitations. It does not appear to me that [appellants] were genuinely ignorant of the identity of [Greenwood] at the time that they filed the complaint with respect to this matter."

Judgment was entered, and this timely appeal[4] followed.

DISCUSSION

I. *Standard of Review*

On appeal from a judgment of dismissal after a demurrer is sustained without leave to amend, we review the pleading de novo to determine whether it alleges a cause of action under any legal theory. (*Cantu v. Resolution Trust Corp.* (1992) 4 Cal.App.4th 857, 879.) "[W]e assume that the complaint's properly pleaded material allegations are true and give the complaint a reasonable interpretation by reading it as a whole." (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.) Also, we accept as true all facts that may be implied or inferred from the facts that have been expressly alleged. (*Marshall v. Gibson, Dunn & Crutcher* (1995) 37 Cal.App.4th 1397, 1403.) But we will not assume the truth of contentions, deductions, or conclusions of law. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

Review of the trial court's failure to grant leave to amend is conducted under the abuse of discretion standard. (*Aubry v. Tri-City Hospital Dist.*, *supra*, 2 Cal.4th at pp. 966-967.) We will reverse if we determine there is a reasonable possibility the pleading can be cured by amendment. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.) "The burden is on the plaintiff, however, to demonstrate the manner in which the complaint might be amended." (*Ibid*.)

II. *The Trial Court Did Not Err*

A. The Act

Appellants contend that their claims for battery and violation of Business and Professions Code section 17200 are not barred by the exclusivity provisions of the Act. We are not persuaded.[5]

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[4] The appeals from both judgments of dismissal have been consolidated.

[5] Because we conclude that appellants' claims are barred by the exclusive provisions of the Act, we need not consider whether they also are time-barred.

"Section 3600 of the Labor Code provides that an employer is liable for injuries to its employees arising out of and in the course of employment, and section 3601 declares that where the conditions of workers' compensation exist, the right to recover such compensation is the exclusive remedy against an employer for injury or death of an employee." (*Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal.3d 465, 467-468.) "The exclusivity rule applies even where the employer's misconduct is serious, willful or intentional; in such cases, Labor Code section 4533 dictates that the employee's recovery is increased by one-half." (*Vuillemainroy v. American Rock & Asphalt, Inc.* (1999) 70 Cal.App.4th 1280, 1283 (*Vuillemainroy*).)

"The exclusivity rule is nonetheless subject to statutory and judicially defined exceptions for certain types of intentional employer misconduct." (*Vuillemainroy*, *supra*, 70 Cal.App.4th at p. 1284.) The applicable law is set forth in *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 713-714 (*Fermino*), wherein our Supreme Court described "a tripartite system for classifying injuries arising in the course of employment. First, there are injuries caused by employer negligence or without employer fault that are compensated at the normal rate under the workers' compensation system. Second, there are injuries caused by ordinary employer conduct that intentionally, knowingly or recklessly harms an employee, for which the employee may be entitled to extra compensation under [Labor Code] section 4553. Third, there are certain types of intentional employer conduct which bring the employer beyond the boundaries of the compensation bargain, for which a civil action may be brought."

Appellants' battery and unfair business practices claims do not fall within this third category of alleged employer misconduct, and thus are subject to the exclusive provisions of the Act. With respect to the battery claim, appellants do not allege that the decedent's death was "proximately caused by a willful physical assault by" respondents. (Lab. Code, § 3602, subd. (b)(1); see also *Fermino*, *supra*, 7 Cal.4th at pp. 710-712.) Rather, their claim is based upon an allegedly unsafe work environment, namely respondents' wrongful violation of occupational safety standards, orders, and special

orders, and their willful violation of California regulations governing the operations of elevating work platforms.

Appellants' arguments notwithstanding, the California Supreme Court in *Fermino* made it clear that such claims are subject to the exclusive provisions of the Act. "In stating that false imprisonment is outside the scope of the compensation bargain because it constitutes a crime against the person of the employee, we do not mean to suggest that regulatory crimes such as violations of health and safety standards or special orders, are actions outside the normal course of employment. On the contrary, the Act includes such regulatory crimes within its scope. [Citations.] It is an expected part of the compensation bargain that industrial injury will result from an employer's violation of health and safety, environmental and similar regulations. What we hold today, rather is that those classes of intentional employer crimes against the employee's person by means of violence and coercion, such as those crimes numerated in part 1, title 8 of the Penal Code, violate the employee's reasonable expectations and transgress the limits of the compensation bargain." (*Fermino*, *supra*, 7 Cal.4th at p. 723, fn. 7.) Because appellants do not allege that respondents committed a battery by means of violence and coercion, their claims fall squarely within the provisions of the Act. (*Vuillemainroy*, *supra*, 70 Cal.App.4th at pp. 1285-1286.)

Similarly, appellants' unfair competition claim is subject to the exclusive provisions of the Act. *Charles J. Vacanti, M.D., Inc. v. State Comp. Ins. Fund* (2001) 24 Cal.4th 800 (*Vacanti*) is instructive. In *Vacanti*, a group of medical providers wanted to sue a group of workers' compensation insurers for allegedly putting them out of business by intentionally delaying payments or refusing to pay for services rendered. (*Id*. at pp. 807, 809.) Their complaint included a cause of action for violations of the unfair competition law. (*Id*. at p. 809.)

After reviewing the plaintiffs' pleading, the Supreme court determined that the alleged acts underlying the unfair competition law claim fell into two categories: "(1) individual acts of a defendant that establish a pattern or practice of mishandling plaintiffs' lien claims; or (2) acts in furtherance of a conspiracy among defendants to

mishandle plaintiffs' lien claims." (*Vacanti*, *supra*, 24 Cal.4th at p. 828.) Our high court held that to the extent that the allegations involved acts by the insurers with respect to their own insurance policies, those claims were subject to the exclusivity provisions of the Act as "each wrongful act is closely connected to a normal insurer activity." (*Ibid*.) On the other hand, the plaintiffs' claims based on the allegation that one insurer conspired with some other insurer to defeat a claim that it did not insure were not barred as those claims based upon misconduct not "connected to a normal insurer activity." (*Ibid*.; see also *Hughes v. Argonaut Ins. Co.* (2001) 88 Cal.App.4th 517, 530.)

Similarly, in the instant case, appellants' SAC alleges a conspiracy among respondents, all of whom were either the decedent's coworkers or employer. The alleged wrongful conduct was closely related to their normal employment relationship with the decedent. Accordingly, appellants' claims are subject to the exclusive provisions of the Act.

The fact that appellants allege criminal conduct does not compel a different result. As the *Vacanti* court explained: "The compensation bargain anticipates that an insurer may commit various misdeeds during the claims process, including some criminal acts." (*Vacanti*, *supra*, 24 Cal.4th at p. 827.) Because respondents did not allegedly commit a criminal act independent of their employment relationship with the decedent, the Act governs.

B. Leave to Amend Properly Was Denied

Appellants complain that they should have been granted leave to amend to allege a cause of action pursuant to the Bane Act, Civil Code section 52.1.[6] Leave to amend properly was denied as appellants lack standing to pursue such a claim in the name of the decedent. (*Bay Area Rapid Transit Dist. v. Superior Court* (1995) 38 Cal.App.4th 141,

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[6] Civil Code section 52.1 provides that a person may bring a cause of action "in his or her own name and on his or her own behalf" (Civ. Code, § 52.1, subd. (b)) against anyone who "interferes by threats, intimidation or coercion, or attempts to interfere by threats, intimidation, or coercion, with the exercise or enjoyment" (Civ. Code, § 52.1, subd. (a)) of any constitutional or statutory right.

144 ["The Bane Act is simply not a wrongful death provision. It clearly provides for a *personal* cause of action for the victim of a hate crime"].)

Appellants also argue that they should have been granted leave to amend to allege additional facts[7] to support their unfair business practice claim against Peerless. We are not persuaded. These proposed allegations do not take their unfair competition claim outside the scope of the Act because they do not demonstrate that Peerless acted outside its role as the decedent's employer. (*Vacanti*, *supra*, 24 Cal.4th at p. 822.)

C. Live Testimony

Finally, appellants protest that the trial court committed reversible error by allowing testimony at the October 25, 2002, demurrer hearing regarding the status of appellants' workers' compensation claim. Aside from the fact that there is no indication in the appellate record that the trial court considered this "evidence" when it sustained respondents' demurrer, it is well-established that we review a demurrer de novo. (*Payne v. National Collection Systems, Inc.* (2001) 91 Cal.App.4th 1037, 1043-1044.) Applying that standard of review, without considering the purported evidence received at the hearing, we conclude that respondents' demurrer to appellants' SAC was properly sustained without leave to amend.

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[7] The additional facts set forth in appellants' opening brief include: Peerless "purposefully seeks out non-English-speaking ethnic minorities, who cannot read safety notices, because their financial incentive to work makes them easy to coerce into working on dangerous, illegally altered construction equipment" and "actively seeks out married minorities, because they are more likely to work under any conditions because of their duties to support their families."

DISPOSITION

The judgments of the trial court are affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD